

REMARKS

Claims 26-36 and 38-39, as amended, are pending in this application for the Examiner's review and consideration. Claim 26 has been amended to require the presence of the various optional ingredients that were previously recited in claim 38, as well as to incorporate the features of claim 37. Claim 37 was canceled. New claim 39 depends from claim 38 and recites the feature of previous claim 37. A marked up version of the amended claims is attached as Appendix A. A clean set of these claims is attached hereto as Appendix B. The amendment does not introduce any new issues or new matter, and as such Applicants respectfully request that this Amendment be entered.

Claims 26-27, 29-34, and 36 were rejected under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 5,175,013 to Huang et al. ("Huang") as evidenced by Tamime, A.Y. et al., *Yoghurt Science and Technology*, Pergamon Press, 1985, p. 393, for the reasons recited on pages 2-3 of the Office Action.

Huang discloses a frozen dessert composition that includes at least about 4 wt% milk protein, about 0.001 wt% to 18 wt% sweetening agent, such as sucrose, about 5 wt% to 80 wt% culture premix, about 6 wt% to 16 wt% partially hydrolyzed starch, about 0.01 wt% to 18 wt% butterfat, and 0.6% vanilla. As recognized in the Office Action, Huang does not disclose or even suggest salt. Claim 26 now recites the presence of salt. Huang also does not disclose or suggest the composition disposed on at least one layer of a biscuit, as recited by claim 26. This feature was previously recited in claim 37, which was not rejected over Huang. Thus, Huang does not disclose or even suggest each and every feature of the present claims, and cannot anticipate them. For these reasons, Applicants respectfully request that the rejection of claims 26-27, 29-34, and 36 under 35 U.S.C. § 102(b) be reconsidered and withdrawn.

Claims 26, 30-31, and 33-36 were rejected under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 4,737,374 to Huber et al. ("Huber") for the reasons recited on page 3 of the Office Action.

Huber discloses a smooth textured soft frozen non-fat yogurt that includes 1.5 to 40% added milk solids, between 13% and 30% sweetening agent, about 3% to 14% yogurt powder, 3% to 14% maltodextrin, about 0.01% to 3.0% artificial flavoring agent, and about 0.01% to 0.15% salt. As recognized in the Office Action, Huber does not disclose or even suggest cream. Claim 26 now recites the presence of cream. Huber also does not disclose or even suggest the composition disposed on at least one layer of a biscuit, as recited by claim 26. This feature was previously recited in claim 37, which was not rejected over Huber.

Thus, Huber does not disclose or even suggest each and every feature of the present claims, and cannot anticipate them. For these reasons, Applicants respectfully request that the rejection of claim 26, 30-31, and 33-36 under 35 U.S.C. § 102(b) be reconsidered and withdrawn.

Claims 26, 30-31, 34, and 36 were rejected under 35 U.S.C. § 102(e) as being anticipated by U.S. Patent No. 5,800,855 to Rosen ("Rosen"), as evidenced by U.S. Patent No. 5,145,697 to Cajigas ("Cajigas") for the reasons recited on page 4 of the Office Action.

Rosen discloses a cream composition that includes about 13% cream cheese, about 24.5% cream, about 19.4% milk, about 10.3% condensed skim milk, about 32.2% liquid can sugar (21.5% dry can sugar along with 10.7% water may be substituted), 0.5% of a stabilizing system (which may contain salt), and 0.1% vanilla extract (*See, e.g.*, Example 1, column 5, lines 40-52). The stabilizing system may further include carob bean gum, guar gum, or carrageenan. Rosen does not disclose or suggest the composition disposed on at least one layer of a biscuit, as recited by claim 26. This feature was previously recited in claim 37, which was not rejected over Rosen. Thus, Rosen does not disclose or suggest each and every feature of the present claims, and cannot anticipate them. For at least this reason, Applicants respectfully request that the rejection of claims 26, 30-31, 34, and 36 under 35 U.S.C. § 102(e) be reconsidered and withdrawn.

Claims 26, 29-36, and 38 were rejected under 35 U.S.C. § 103(a) as being obvious over Huang in view of Huber for the reasons recited on pages 4-5 of the Office Action.

As detailed above, Huang and Huber, individually, fail to disclose or suggest each feature of the claims, as amended. Huang and Huber also fail to disclose or suggest each feature when combined, since their combination does not provide any teaching of the composition disposed on at least one layer of a biscuit, as recited by claims 26 and 39. This feature was previously recited in claim 37, which was not rejected over this combination of references. Thus, even the combination of references does not disclose or suggest each feature of the present claims as is required to establish a *prima facie* case of obviousness. For these reasons, Applicants respectfully request that the rejection of claims 26, 29-36, and 38 under 35 U.S.C. § 103(a) be reconsidered and withdrawn.

Claims 26, 30-31, 33-36, and 38 were rejected under 35 U.S.C. § 103(a) as being obvious over Huber in view of U.S. Patent No. 5,202,146 to Singer et al. ("Singer") for the reasons recited on page 6 of the Office Action.

As detailed above, Huber does not disclose or suggest each feature of the present claims. Singer discloses a flavor delivery system for fat free foods that includes different amounts of heavy cream, while keeping the total fat of the food product under 1%. Singer does not disclose or suggest the composition disposed on at least one layer of a biscuit, as recited by claims 26 and 39. This feature was previously recited in claim 37, which was not rejected over this combination of references. Thus, even the combination of references does not disclose or suggest each feature of the present claims as is required to establish a *prima facie* case of obviousness. For these reasons, Applicants respectfully request that the rejection of claims 26, 30-31, 33-36, and 38 under 35 U.S.C. § 103(a) be reconsidered and withdrawn.

Claims 26-32, 35, and 37-38 were rejected under 35 U.S.C. § 103(a) as being obvious over U.S. Patent No. 4,721,622 to Kingham et al. ("Kingham") in view of U.S. Patent No. 5,573,793 to Saintain ("Saintain") for the reasons recited on pages 7-8 of the Office Action.

Kingham discloses a food product with a bread-like casing having a filling, with an optional barrier layer (*See, e.g.*, Abstract). Kingham teaches a large variety of filling materials, including a filling of cream cheese, double cream, milk, ground onions, salt, spices, maize starch, gelatin, and water (Example 1); and yogurt, dried cream, dried onion, modified starch, salt, pepper, dextrose monohydrate, disodium dihydrogen pyrophosphate, fat, emulsifier, gelatin, water, cooked bacon, and grated cheddar cheese (Example 2). It would have been clear to one of ordinary skill in the art merely from this list of ingredients that Kingham is irrelevant to the present invention.

In any event, Kingham fails to disclose or suggest a milk derivative (as recognized in the Office Action), sugar, or an aromatic product, as recited by the present claims. The Office Action states, without any support in the cited references, that "one would have been substituting one source of milk solids for another." This is an improper rejection, as there must be evidence in the cited reference(s) of such motivation, and it must be made of record by the Patent Office to support such contentions. Broad conclusory statements standing alone are not "evidence." *See, e.g., In re Kotzab*, 55 U.S.P.Q.2d 1313 (Fed. Cir. 2000). Indeed, one of ordinary skill in the art would not necessarily have been motivated to substitute one amount of milk for a different amount of powdered milk. Furthermore, Kingham discloses a food product with a bread-like casing having a filling within the bread-like casing, *i.e.*, the food product of Kingham completely surrounds the filling.

Saintain discloses a food composition containing a cookie or chocolate shell having a dairy based filling that is fermented with live lactic acid bacteria. The filling may contain yogurt, sugars, milk proteins, and several other ingredients. Saintain does not disclose or suggest sour cream or dairy cream containing 25% to 45% of fatty substances or salt, as recited by the present claims. Saintain also does not disclose or suggest the composition disposed on at least one layer of a biscuit, as recited by claims 26 and 39. The Office Action also states that Saintain teaches a sweet filling with high sugar and no salt, which would *teach away* from the inclusion of salt as presently recited. The Office Action cannot properly state that the combination of Kingham and Saintain teaches the features of the invention by using the salt of Kingham's filling and the sugar of Saintain's filling, since these cited references effectively teach that their fillings are mutually exclusive. For these reasons, even the combination of references does not disclose or suggest each feature of the present claims.

Also, there was no motivation for one of ordinary skill in the art to combine the snack food product of Kingham with the cookie or chocolate shell composition of Saintain, as is also required to establish a *prima facie* case of obviousness. Only through a hindsight reconstruction of picking and choosing features from the disclosure of the present invention would one ever attempt to combine these disparate references. One of ordinary skill in the art would not have been motivated to combine Kingham's bacon and cheddar cheese, or the filling of Example 1, with the cookies having dairy filling taught by Saintain, for example, unless resort were improperly made to the Applicants' own teachings in the application to pick and choose ingredients required to obtain the Applicants' invention.

Moreover, one of ordinary skill in the art would not have reasonably expected to achieve success in combining such disparate products to provide a cream composition as presently recited. It would not have been reasonable to take Kingham's food product, remove various filling components, substitute various other components for those as to which both references are silent, and expect to successfully obtain the presently claimed invention.

Even if Kingham taught all features of the claim, which the Office Action concedes it does not, the transition language in claim 38 "consisting essentially of" specifically excludes various Kingham ingredients from the presently recited cream composition as they would materially affect the novel features of the invention. This language specifically excludes the onions and bacon of Kingham that make it completely irrelevant to the present invention. Thus, Kingham has been explicitly excluded from claim

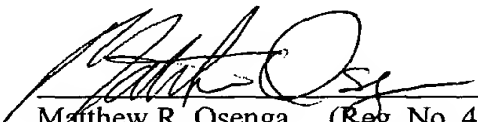
38 by the transition language thereof, even if it were relevant. For these reasons, Applicants respectfully request that the rejection of claims 26-32, 35, and 37-38 under 35 U.S.C. § 103(a) be reconsidered and withdrawn.

Accordingly, applicants now believe all claims are in condition for allowance. Should the Examiner not agree with this position, a telephone or personal interview is requested to resolve any remaining issues and expedite allowance of this application.

No fee is believed to be due for this response. Should any fees be required, however, please charge such fees to Winston & Strawn Deposit Account No. 501-814.

Respectfully submitted,

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Date


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APPENDIX A: MARKED UP VERSION OF AMENDED CLAIMS

26. (Amended) A cream composition comprising a mixture of:
10% to 20% of a milk derivative;
8% to 30% of a sugar;
10% to 60% of a fermented dairy product;
0.01% to 35% of a texturizing agent;
[up] 0.01% to 25% of sour cream or dairy cream containing 25% to 45% of
fatty substances;
[up] 0.01% to 20% of an aromatic product; and
[up] 0.01% to 0.5% of salt;
wherein the cream composition is disposed on at least one layer of a biscuit.